NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

GROWTH RESOURCE GROUP, INC., Plaintiff and Appellant, v. PRESTON DuFAUCHARD, as CALIFORNIA CORPORATIONS COMMISSIONER, Defendant and Respondent.	B202359 (Los Angeles County Super. Ct. No. BS106158)

APPEAL from a judgment of the Los Angeles Superior Court, David Yaffe, Judge. Affirmed.

Law Offices of William W. Palmer, William W. Palmer and Frederick M. Ray for Plaintiff and Appellant.

Preston DuFauchard, in pro. per., Wayne Strumpfer, Alan S. Weinger and Judy L. Hartley for Defendant and Respondent.

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SUMMARY

Appellant Growth Resource Group, Inc. (GRG) makes small, short-term consumer loans, using borrowers' vehicles as collateral. An investigation in 1997 by respondent, the California Corporations Commissioner, revealed GRG was engaged in illegal loan practices. Among other things, GRG had added excessive administrative fees and premiums for collateral insurance to the principal of numerous loans, causing them to exceed $2,500, which allowed GRG to charge interest above the statutorily regulated rate for loans under $2,500. For those loans, even after the insurance GRG placed was cancelled, thereby reducing the principal of a loan to the regulated interest rate, GRG had failed to recalculate the loan to reduce the interest rate. The Commissioner demanded GRG recalculate the loan principal, issue refunds to affected borrowers, and report back to the Commissioner or face administrative discipline.

In 1999, the parties reached a settlement agreement. GRG agreed to recalculate or "recast" every loan made within a certain period for which the insurance it forced the borrower to purchase was cancelled, to issue refunds for excess interest paid on each loan for which the recast amount was less than $2,500, and to escheat to the state those refunds returned to GRG as undeliverable. In exchange for the agreement, the Commissioner refrained from pursuing disciplinary action against GRG.

GRG failed to comply with the agreement and the Commissioner filed an administrative action to enforce the agreement and revoke GRG's licenses. An administrative law judge agreed GRG breached the settlement agreement and the Commissioner imposed discipline. GRG filed a petition seeking a writ of mandate (Code Civ. Proc., § 1094.5) to overturn the administrative decision. The trial court found no merit in GRG's contentions, and denied the petition, and GRG appealed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

GRG's business practices and the initial regulatory examination

GRG is a finance lender. It is licensed by the California Corporations Commissioner under the California Finance Lenders Law (CFLL), Financial Code section 22000 et seq. (Unless otherwise indicated, all statutory references are to the Financial Code.) GRG was issued its first lending license (in the name of "EZ Car Cash") in November 1995. The Commissioner subsequently issued three additional lenders' licenses to GRG, one in 1996 and two in 1999.

GRG makes loans to high-risk borrowers in need of immediate cash. The borrower's vehicle is used as collateral to secure the loan. As a term of the loan, GRG requires a borrower to carry sufficient insurance on his or her vehicle ("collateral insurance") and to name GRG as the loss payee in case the car is damaged, destroyed or stolen. In the past, if a borrower lacked sufficient collateral insurance at the time a loan was made (or had this insurance but could not prove its existence), GRG would buy the insurance itself and add the cost of the premium to the loan principal.

In mid-1997, the Commissioner initiated a regulatory examination into GRG's lending activities. As a result of that investigation, the Commissioner concluded:

(1) GRG had failed to calculate administrative fees in conformance with section 22305;

(2) GRG had failed to notify potential borrowers, in advance of the time for executing loan documents that, unless they could provide proof of collateral insurance and an endorsement naming GRG as loss payee, collateral insurance would be purchased and placed at their expense (a practice known as "force-placement");

(3) As a result of costs associated with improper administrative fees charged by GRG and its force-placement of collateral insurance, many borrowers' loans were pushed beyond the $2,500 regulatory ceiling, allowing GRG to charge a higher interest rate than the controlled interest rate imposed by the CFLL (§§ 22303 and 22304) for loans under $2,500;[1] and

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[1] For example, the Commissioner determined GRG made a number of loans for $2,425.01. To that amount GRG added an excessive administrative fee of $75 to the principal amount (the legal limit for such loans was 5 percent or $50, whichever was less, and lenders are prohibited from compounding charges). GRG then used the resulting

> (4) There were numerous instances when, shortly after a loan had been made, the borrower provided proof of existing or new collateral insurance coverage naming GRG as loss payee, resulting in almost immediate cancellation of GRG's force-placed insurance (known as "flat cancellation") and reduction of the loan principal below the $2,500 statutory threshold. In each instance, GRG had failed to readjust the interest rate on the loan to the lower, statutorily regulated rate or to refund overpaid interest, a practice specifically disallowed by section 22251, subdivision (a), if done for the purpose of evading the regulatory ceiling.[2]

The Commissioner demanded GRG recast all loans for which its force-placed collateral insurance had been flat-cancelled, reducing the principal amount to under $2,500 (exclusive of administrative fees and insurance), refund overpaid interest and administrative fees to those borrowers, and report back. GRG was informed its failure to comply would subject its licenses to disciplinary action.

The settlement agreement

GRG contested the Commissioner's allegations and hired attorneys. No formal accusation was filed against GRG.[3] Instead, the parties engaged in protracted

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total ($2,500.01) to calculate additional administrative fees and the interest rate charged. The Commissioner concluded GRG had unlawfully compounded fees by adding the excessive $75 administrative fee to the loan principal to determine the amount of additional administrative fees to charge a borrower. (§§ 22305, 22309.)

2 The Commissioner also alleged GRG operated an unlawful rebate program and had threatened borrowers who complained about GRG to the Commissioner. These allegations are no longer at issue.

3 An administrative "accusation" is the pleading by which an agency initiates proceedings to discipline or revoke a professional license, under the Administrative Procedures Act, Government Code section 11340 et seq. (Gov. Code, § 11503.)

negotiations over the next 18 months.[4] On March 17, 1999, they executed a settlement agreement (the agreement).

As a result of the agreement, GRG agreed to review each loan it made between November 1995 and October 1997 and to identify any loan on which it had force-placed collateral insurance that was later flat-cancelled. GRG agreed it would "recast"[5] each of those loans and submit quarterly reports to the Commissioner. For each loan for which the recast principal amount was less than $2,500, GRG agreed to recalculate the interest rate at the statutorily regulated rate and refund any excess interest paid by the borrower. All refunds would be made within two years, beginning in April 1999. The parties also agreed all borrower refunds returned to GRG as "undeliverable" would be escheated to the State Controller (Controller) "within the time period provided by the Unclaimed Property Act, Code of Civil Procedure, [section 1500 et seq.] which the parties understand to be three years from the date upon which it is determined that the refund is undeliverable."[6]

The Commissioner agreed not to take any administrative action against GRG's licenses so long as it complied with the terms of the agreement. The Commissioner also granted GRG's pending applications for two additional licenses.

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4 At some point during the negotiations, GRG submitted applications for two additional lending licenses.

5 To "recast" the loan meant GRG would subtract the amount of the flat-cancelled collateral insurance premium from the principal loan amount and recalculate the interest rate and accrued interest based on the statutorily authorized interest rate for the new, lower amount of the principal loan.

6 With respect to future loans, GRG agreed to undertake remedial measures to address the Commissioner's concerns regarding the legality of its rebate programs, its method of calculating administrative fees, the need to provide advance notice of the requirement for collateral insurance to buyers, minimum loan amounts, the addition of legal fees prohibited by the CFLL in dispute resolutions, and threats against borrowers who complained to the Commissioner about GRG.

Proposed Legislation – Sen. Bill No. 579

In 1998, while the parties were engaged in settlement negotiations, the Commissioner sponsored Senate Bill No. 579 (Sen. Bill No. 579), the purpose of which was to prohibit certain charges from being included in consumer loans for calculating interest. Sen. Bill No. 579 was introduced in February 1999, passed by the legislature later that year (after the agreement had been executed), and became effective (as an amendment to section 22251) on January 1, 2000. Its effect was to redefine "bona fide principal amount," to prohibit the inclusion of administrative fees and collateral insurance premiums as loan principal to determine regulatory ceilings, including the calculation of interest rates, whether or not such insurance was lawfully placed. (See § 22251, subd. (c).)

GRG claims Sen. Bill No. 579 was intended to prohibit its lending practices about which the Commissioner complained in 1997 and that, in fact, the Commissioner cited GRG's previously lawful lending practices as a "loophole" in the law as an impetus for seeking the statutory change. The Commissioner cited two examples in which "unscrupulous lenders" had taken advantage of this loophole. The first, which ostensibly referred to GRG, involved "a lender making used car loans in which it would add such charges as administrative fees and costs of insurance to the principal amount of the loans. By doing so, the lender increased the amount of these small loans ($1,700) into larger loans ($2,500) thereby avoiding the statutory limitation on rates and charges. As a result, the annual percentage rate for many loans exceeded 140%." The second example involved a lender's solicitation of will beneficiaries for "probate loans" secured by proceeds from the estate. Borrowers were charged exorbitant fees and interest on relatively small loans.

No one from the Commissioner's office specifically informed GRG that Sen. Bill No. 579 was pending before the agreement was executed.

The Commissioner audits GRG, and demands escheatment and special reports

In August 2003, the Commissioner examined GRG's books to determine if it had complied with the terms of the agreement. That investigation revealed that, as required by the agreement, GRG had issued over $300,000 in borrower refunds as a result of recasting the loans in question. However, refunds of approximately $200,000 had been returned to GRG by the post office as "undeliverable." GRG had not delivered any of the unclaimed funds to the Controller. GRG said it had not yet begun to escheat the undeliverable refunds because it believed that, under the terms of the settlement agreement, it was not required to begin doing so until three years after the lapse of the two-year refund period, or until March or April 2004.

The Commissioner's staff had a different -- equally mistaken -- belief. On November 3, 2003, Kenneth Wu, a representative of the Commissioner's office, wrote GRG to demand immediate escheatment of all unclaimed refund checks. When he wrote that letter, Wu had not reviewed the specific escheat timing provision contained in the settlement agreement. As a result, he erroneously informed GRG the applicable time limit was the one-year time limit for escheatment under Code of Civil Procedure section 1519.5. Wu's demand triggered a flurry of letters between GRG and the Commissioner's office. During this period, no one at the Commissioner's office corrected Wu's mistake. Instead, they repeatedly reiterated Wu's erroneous demand. In addition, the Commissioner's staff made repeated demands to GRG for reports regarding the delivered funds and escheatment of undelivered refunds. GRG ignored the demands.

The administrative hearing

On May 10, 2005, the Commissioner filed an administrative accusation against GRG. It alleged GRG had breached the settlement agreement by failing to escheat to the Controller over $200,000 in undeliverable refund checks, despite numerous demands therefor, and that the escheatment should have been completed no later than mid-2004. The Commissioner also alleged that, pursuant to section 22159, subdivision (b), it had demanded that GRG submit special reports regarding the refunds and escheatment. Those demands were made numerous times between March and December 2004, but GRG failed to submit any reports.[7] The Commissioner sought revocation of GRG's licenses.

A three-day administrative hearing was conducted in April 2006. In July 2006, the administrative law judge (ALJ) issued a proposed decision. He concluded there was cause to discipline GRG due to its failure to comply with the Commissioner's legitimate demand for special reports. The ALJ further found the settlement was a binding agreement between GRG and the Commissioner, and that GRG failed to establish the agreement was unenforceable as a result of fraud on the part of the Commissioner, or the parties' mutual mistake of law. The ALJ found GRG agreed to escheat undeliverable refunds, and that the Commissioner acted within its authority by demanding timely escheatment. However, the Commissioner's representative, Wu, made erroneous demands to GRG regarding the timing requirements for escheatment. The demands made by Wu, and subsequent letters from the Commissioner's representatives reiterating those demands, differed from the settlement terms. As a result, although the Commissioner had the authority to demand GRG's compliance with the agreement in furtherance of the CFLL, it did not have the right to demand GRG do an act to which the parties had not agreed. Accordingly, GRG was not properly subject to discipline for failing to comply with the Commissioner's demands for escheatment of undeliverable refunds, because those demands contradicted the terms of the settlement agreement. However, the ALJ observed that, even though GRG was not required to have escheated the undeliverable refunds within the time limit demanded by Wu, GRG had acknowledged it was not

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7 The accusation also alleged GRG had not made a good faith effort to disburse the refund checks. Specifically, refunds had been sent to borrowers via certified, return-receipt post with a cover letter showing through the envelope window with "DEMAND FOR MONEY" as the reference line. The Commissioner alleged GRG did this in order to dissuade recipients from accepting delivery of or opening the letters. This allegation is no longer at issue.

entitled to retain that money and had agreed to deliver those refunds at some point. Thus, GRG breached the agreement by failing to escheat any amount at any time, even though the agreement clearly required it to have completed the escheatment process, at least by the time the administrative hearing began in mid-2006.

The ALJ deemed a seven-day suspension of GRG's licenses warranted for its unexcused failure to submit the special reports and its breach of the agreement by failing to escheat any funds to the Controller. The ALJ concluded it would be appropriate to order GRG to escheat the undeliverable refunds to the Controller within 180 days, and to require proof it had done so, based on GRG's express agreement to remit those funds. With respect to the Commissioner's request for revocation of GRG's licenses, the ALJ found that punishment "overly harsh." He concluded GRG's misconduct was best described as "moderate" and, notwithstanding its failure to deliver the refunds, the Commissioner had not established any direct consumer injury and GRG had satisfied its other contractual obligations. The Commissioner adopted the ALJ's proposed decision in October 2006, and suspended GRG's licenses for a week.

GRG seeks relief from the trial court

GRG filed a petition for a writ of administrative mandate with the trial court. (Code Civ. Proc., § 1094.5.) GRG urged the court to overturn the ALJ's decision arguing (1) GRG had the right to rescind the agreement based on fraud or mistake; (2) the Commissioner exceeded its jurisdiction by ordering escheatment of unclaimed funds; and (3) the Commissioner exceeded its jurisdiction by enforcing a settlement agreement it never reduced to a formal order or decision. The trial court denied the petition. This appeal followed.

DISCUSSION

GRG contends (1) the Commissioner lacked jurisdiction to order escheatment as the agreement is unenforceable; (2) the ALJ and trial court erred in concluding rescission was not warranted; and (3) the administrative and trial court decisions conflict with controlling law.

1. Standard of review

Code of Civil Procedure section 1094.5 governs judicial review by administrative mandate of any final decision rendered by an administrative agency. If the decision of an administrative agency substantially affects a fundamental vested right, then the trial court must examine the administrative record for errors of law and exercise its independent judgment on the evidence. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 143; *Dickey v. Retirement Board* (1976) 16 Cal.3d 745, 751.) In the appellate court, the appropriate standard of review is the substantial evidence test. (*Fukuda v. City of Angels* (1999) 20 Cal.4th 805, 824; *Bixby v. Pierno*, *supra*, 4 Cal.3d at p. 143, fn. 10.) Therefore, where the trial court is required to exercise its independent judgment, we review the record to determine whether its judgment is supported by substantial evidence. (*MHC Operating Limited Partnership v. City of San Jose* (2003) 106 Cal.App.4th 204, 218.)

Questions of law, on the other hand, are subject to a de novo standard of review. (*Stermer v. Board of Dental Examiners* (2002) 95 Cal.App.4th 128, 132.) The proper interpretation of a statute, and its application to undisputed facts, presents a question of law that we review independently. (*Schutte & Koerting, Inc. v. Regional Water Quality Control Bd*. (2007) 158 Cal.App.4th 1373, 1384; *MHC Operating Limited Partnership v. City of San Jose*, *supra*, 106 Cal.App.4th at p. 219.)

2. The settlement agreement is enforceable

GRG argues the agreement is unenforceable because the Commissioner acted without jurisdiction by applying an “underground regulation” to GRG’s lawful activities in violation of the Administrative Procedure Act, Government Code section 11340 et seq. (APA), and by failing to reduce the agreement to a formal “order” or “decision.”

First, we reject GRG’s assertion that all its activities which precipitated this controversy were lawful. GRG’s practice of including administrative fees and insurance premiums in the bona fide loan principal does appear to have fallen into the “legal loophole” addressed by Sen. Bill No. 579. However, GRG’s practice of charging and compounding excessive administrative fees and its force-placement of duplicative insurance has, at all times relevant here, been unlawful. (See, e.g., §§ 22305, 22309.) Under the CFLL, lenders are prohibited from requiring or selling collateral insurance if insurance is already in place, and must take reasonable precautions to avoid selling duplicate insurance. (Cal. Code Regs., tit. 10, § 1488.) Although GRG concedes it was obligated to avoid placing duplicative insurance, it insists no regulation required it to notify borrowers in advance of execution of the loan documents that they would be required to maintain a certain level of collateral insurance and name GRG as a loss payee. There is no merit in this argument. If a lender must, as GRG, acknowledges, "take reasonable precautions to *avoid* the sale of duplicative insurance," then, logic dictates GRG must make inquiries in advance and/or advise borrowers a reasonable amount of time *before* they show up to sign loan documents that they will have to carry adequate collateral insurance with a loss payee endorsement in favor of GRG, and bring proof of such insurance if they have it, or obtain it before they come.[8] It was GRG's failure to comply with these requirements, among other misdeeds. that led to the Commissioner's initial investigation and, ultimately, to GRG's agreement to settle to avoid administrative discipline.

a. The Commissioner did not promulgate "underground regulations" in violation of AP

GRG argues the Commissioner violated the APA by failing to promulgate regulations to address the situation that led to the agreement, and then manufacturing and applying a set of nonexistent rules to GRG's business activities. This contention lacks merit. The Commissioner did not intend its "rule" to apply generally. Rather, the

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8 GRG has the right to require proof that collateral insurance a borrower provides is "reasonably sufficient to protect [GRG] considering the circumstances of the loan," and is free to reject coverage that does not include the loss payable endorsement it requires. (Cal. Code Regs., tit. 10, §§ 1488, subd. (a)(2), 1499, subd. (b)(4).)

Commissioner applied existing law to a specific problem revealed by the 1997 investigation of GRG.

(*i*) *The APA framework*

"The APA establishes the procedures by which state agencies may adopt regulations. The agency must give the public notice of its proposed regulatory action (Gov. Code, §§ 11346.4, 11346.5); issue a complete text of the proposed regulation with a statement of the reasons for it (Gov. Code, § 11346.2, subds. (a), (b)); give interested parties an opportunity to comment on the proposed regulation (Gov. Code, § 11346.9); and forward a file of all materials on which the agency relied in the regulatory process to the Office of Administrative Law (Gov. Code, § 11347.3, subd. (b)), which reviews the regulation for consistency with the law, clarity, and necessity (Gov. Code, §§ 11349.1, 11349.3.)" (*Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 568 (*Tidewater*).) "One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation [citation], as well as notice of the law's requirements so that they can conform their conduct accordingly [citation]." (*Tidewater, supra*, 14 Cal.4th at pp. 568-569.)

To that end, the APA provides that "[n]o state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a regulation . . . , unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation . . ." in accordance with the provisions of the APA. (Gov. Code, § 11340.5, subd. (a).) "Regulation" is broadly defined. The term encompasses "every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation, order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one that relates only to the internal management of the state agency." (Gov. Code, § 11342.600, subd. (g).) Regulations "subject to the APA [have] two principal identifying characteristics. [Citation.] First, the agency must intend its rule to apply generally, rather than in a specific case. The rule need not, however, apply universally; a rule applies generally so long as it declares how a certain class of cases will be decided. [Citations.] Second, the rule must 'implement, interpret, or make specific the law enforced or administered by [the agency], or . . . govern [the agency's] procedure.' (Gov. Code, § 11342[.600].)" (*Tidewater*, *supra*, 14 Cal.4th at p. 571.)

"Underground regulations" are regulations that have not been adopted in conformity with the APA's rulemaking procedures. An "underground regulation" is "any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, including a rule governing a state agency procedure, that is a regulation as defined by section 11342.600 of the Government Code, but has not been adopted as a regulation and filed with the Secretary of State pursuant to the APA and is not subject to an express statutory exemption from adoption pursuant to the APA." (Cal. Code Regs., tit. 1, § 250, subd. (a).) Underground regulations are invalid. (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333, 340.)

(ii) application of the APA framework to this action

We conclude the Commissioner did not violate the APA because the interpretation of the CFLL employed here arose directly out of the specific circumstances disclosed by its regulatory examination of GRG. It was not a policy of general application to an entire industry, but was directed solely at GRG's specific conduct.

The Commissioner's 1997 regulatory examination of GRG disclosed that GRG force-placed collateral insurance on a number of its borrowers' loans, causing the loan principal to exceed the $2,500 regulated rate, and giving GRG an opening to charge a higher interest rate. A number of these borrowers either secured their own collateral insurance shortly after execution of loan documents or proved they already had the requisite coverage in place. This resulted in the force-placed duplicative insurance being flat-cancelled and the loans' principal dropping back within the regulated limit. The Commissioner's examination revealed GRG had failed or refused to recast these loans to recalculate an appropriate interest rate. The problem with GRG's conduct was not merely that it added the force-placed collateral insurance premium to the loan principal, conduct that Sen. Bill No. 579 ultimately prohibited under all circumstances. Rather, the problem was GRG's possible deception by force-placing collateral insurance in the first place.

If, as GRG asserts, the Commissioner had been trying to enforce the effects of Sen. Bill No. 579 prior to its enactment by the Legislature, it would have taken issue with every loan that GRG made which exceeded $2,500 as a result of the addition of administrative fees or force-placed collateral insurance. It did not. The Commissioner took issue only with those loans exceeding $2,500 due to the force-placement of collateral insurance where the force-placed collateral insurance was flat-cancelled soon after the loan documents were signed. It was that suspicious timing that was indicative of GRG's placement of duplicative collateral insurance and its possible deception regarding placement of that insurance at the outset. In other words, as to GRG's conduct for loans made between 1995 and 1997, the Commissioner claimed only that *improperly placed* duplicative collateral insurance should not be considered part of the loan principal, not that no collateral insurance premium could ever be included in the loan principal.

An agency's interpretation arising in the course of a case-specific adjudication is not a regulation, underground or otherwise. (*Tidewater, supra*, 14 Cal.4th at p. 571.) Since its promulgation in 1983, California Code of Regulations, title 10, section 1488 has mandated that CFLL lenders "take reasonable precautions *to prevent the sale* of insurance that will result in *duplicate coverage*." (Cal. Code Regs., tit. 10, § 1488, subd. (c), emphasis added.) Any loan transaction or sale of insurance made in violation of California Code of Regulations, title 10, section 1488 also violates sections 22311 and 22312, which forbid lenders from requiring borrowers to purchase unrelated collateral articles in connection with a loan, when the purpose for the sale is to evade the statutorily regulated interest rate. (Cal. Code Regs., tit. 10, § 1490.) The conduct of GRG with which the Commissioner primarily took issue was its failure to take the "*reasonable precautions*" required by section 1488 *to avoid* the sale of duplicative collateral insurance that resulted in unnecessary force-placement of insurance on numerous small loans, and its further suspicious failure or refusal to recalculate and reduce interest rates to the statutory rate applicable to those loans upon cancellation of the duplicative insurance premium.

GRG claims there is no evidence its force-placement of collateral insurance ever caused any borrower to incur additional expense. The undisputed fact that GRG issued over $300,000 in refunds belies this contention. If GRG's force-placed collateral insurance had not been duplicative, there would have been no requirement for flat-cancellation. And, the fact that GRG issued refunds of $300,000 after recasting just some of the small loans it made within a two-year period is clear evidence numerous borrowers -- most of whom never received their refund -- incurred unnecessary additional expenses.

The Commissioner did not promulgate an underground regulation in violation of the APA. There is no indication the Commissioner's application of the CFLL with respect to GRG's conduct was intended as a standard of general application. Rather, it was directed solely at the specific fact pattern generated by one particular licensee's egregious misconduct.[9]

b. The Commissioner had the authority to settle the dispute

GRG also argues the Commissioner lacked jurisdiction to enforce the agreement in the disciplinary proceeding because it never reduced the parties' settlement agreement to a formal "order" or "decision." We are not persuaded.

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9 Without explanation or citation to authority or the record, GRG argues that, even if the Commissioner's rules were intended to apply only to GRG, and not other licensees, "it must then follow that those rules thereby limited and conditioned the license" and are therefore invalid. This conclusory assertion, without pertinent argument attempting to apply the law to the circumstances of this case, is inadequate. We therefore treat the issue as abandoned and do not address its merits. (*Strutt v. Ontario Sav. & Loan Assn.* (1972) 28 Cal.App.3d 866, 873 ["An appellate court is not required to consider alleged errors where the appellant merely complains of them without pertinent argument"].)

As discussed above, the Commissioner is required to handle administrative actions in accordance with the APA. (§ 22717.) The APA provides that an administrative "agency may formulate and issue a decision by settlement, pursuant to an agreement of the parties, without conducting an adjudicative proceeding." Generally speaking, a settlement may occur before or after an agency issues an accusation.[10] (Gov. Code, § 11415.60, subd. (b).) Moreover, so long as the settlement agreement does not violate a statute or regulation, it may be "on any terms the parties determine are appropriate," and may include sanctions the agency would otherwise lack the power to impose. (Gov. Code, § 11415.60, subds. (a), (c).) GRG incorrectly asserts that the settlement agreement must be reduced to a formal order. The APA requires only that the agency issue a "decision" (Gov. Code, § 11415.60, subd. (a)), which is defined as "an agency action of specific application that determines a legal right, duty, privilege, immunity, or other legal interest of a particular person." (Gov. Code, § 11405.50, subd. (a).)

The settlement agreement between GRG and the Commissioner satisfies these conditions. Even though it is not entitled "decision," the agreement satisfies the statutory requirements for agency "decisions by settlement." It applies specifically to GRG and determines that licensee's legal duties, i.e., that, to avoid disciplinary action for its unlawful conduct, GRG would recast certain loans, issue refunds, deliver unclaimed borrower refunds to the Controller, and refrain from certain conduct in the future. There is no requirement that the Commissioner issue an "accusation" before entering into the settlement, because the agreement did not revoke, suspend, limit or condition GRG's licenses.[11]

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10 In a proceeding to determine whether an occupational license should be revoked, suspended or limited, a settlement may be made before, during or after the adjudicative proceeding, so long as an accusation is issued before the settlement is made. (Gov. Code, § 11415.60, subd. (b).)

11 GRG claims its licenses were somehow limited or conditioned by the agreement, but fails to explain how a requirement that it refund and divest itself of borrower funds to which it has never claimed an entitlement, limited or conditioned its lending licenses in

In addition to its statutory authority, the Commissioner also has the implied power to settle licensing disputes, which, as here, are later incorporated into a formal order of administrative discipline. (See *Stermer v. Board of Dental Examiners*, *supra*, 95 Cal.App.4th at p. 133 [affirming stipulation between dentist and Board of Dental Examiners, which was incorporated into a formal order of discipline, revoking dentist's license and placing him on probation]; *Frankel v. Board of Dental Examiners* (1996) 46 Cal.App.4th 534, 544 [administrative agencies have implied power to settle licensing disputes, and to incorporate the settlement into a formal Board decision].) In the absence of a statutory framework, enforcement of agreements to settle a licensing agency's accusation is governed by standard principles of contract law. (*Frankel v. Board of Dental Examiners*, *supra*, 46 Cal.App.4th at p. 544.)[12]

GRG does not dispute this rule, but insists the trial court erred in applying general contract principles when it found discipline was properly imposed against GRG based on its mistaken understanding that GRG agreed to such discipline in the settlement. We agree that the trial court was wrong on that point. The discipline proposed by the ALJ and later imposed by the Commissioner (suspension of GRG's licenses) was not agreed upon by the parties. It arose from GRG's breach of the agreement, and its refusal to submit special reports the Commissioner had demanded, and the administrative accusation the Commissioner was forced to file as a result, seeking revocation of GRG's licenses. Nevertheless, we find no error.

The Commissioner has the power to conduct investigations and prosecute actions concerning matters within its administrative jurisdiction and to enforce the CFLL. (Gov.

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any respect. It is true that GRG's two additional license applications were granted only after the agreement was reached. However, the record contains no indication the Commissioner placed any specific limitations or conditions on those licenses.

12 We need not address GRG's contention that only the Controller has authority to order escheatment given our conclusion that the Commissioner was free to settle with GRG.

Code, § 11180, subd. (a).) In furtherance of that power and the purpose of the CFLL, the Commissioner may require a licensee to submit special reports. (§§ 22150, 22159, subd. (b).) A licensee's failure to comply with such a demand may constitute grounds for suspension or revocation of its license. (§ 22714, subd. (a)(1).) In addition, implicit in the Commissioner's power to investigate and instigate disciplinary action against GRG is the authority to negotiate a settlement on any appropriate terms. (*Rich Vision Centers, Inc. v. Board of Medical Examiners* (1983) 144 Cal.App.3d 110, 114-115.); *Frankel v. Board of Dental Examiners, supra*, 46 Cal.App.4th at p. 547.) In this case, the parties agreed GRG would deliver $200,000 in unclaimed borrower funds to the Controller. GRG failed to abide by that agreement.

The ALJ found the Commissioner was entitled to demand special reports and that GRG's failure to deliver those reports, coupled with its failure to escheat the undelivered refunds at any time despite its express agreement to do so, constituted valid cause for discipline. We find no error in that conclusion.[13]

3. There are no grounds on which GRG may rescind the agreement

GRG argued unsuccessfully below that the settlement agreement is unenforceable and should be rescinded either because of the Commissioner's fraud in procuring the agreement in the first place, or because of the parties' mutual mistake of law. The trial court found no basis in fact or law to support either contention. We agree.

a. The agreement was not procured by fraud

The trial court concluded GRG failed to show the agreement was void because it was procured by fraud on the part of the Commissioner. GRG continues to assert it was

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13 The trial court's mistaken conclusion regarding the terms of the parties' agreement poses no impediment to our review. We and the trial court stand in an essentially identical position with regard to the administrative record to determine whether, as a matter of law, the agency's findings are sufficient and supported by substantial evidence. (*Miller v. Board of Supervisors* (1981) 122 Cal.App.3d 539, 543, fn. 3.)

induced to enter into the agreement in 1999 as a result of false assertions that its business practices were illegal. The record reflects otherwise.

Proof of actual fraud -- the only sort alleged by GRG -- is a question of fact. (Civ. Code, § 1574.) To prove fraud in the procurement of a contract which renders the contract void, the party asserting fraud must show that the other party made a false representation of material fact, knowing its representation was untrue; the false representation was made to persuade the complaining party to agree to the contract; and that the complaining party reasonably and detrimentally relied on that representation and would not have entered into the agreement had it known the representation was false. (See 1 Witkin, Summary of Cal. Law (10th ed. 2005), Contracts, § 286, p. 315.) The only evidentiary basis for GRG's claim of fraud is that, at some point during the parties' settlement negotiations, the Commissioner sponsored Sen. Bill No. 579, which rendered some of GRG's business practices unlawful, but failed to disclose the pending legislation. This will not suffice.

First, GRG did not establish any statement made by the Commissioner's staff was false. Both the ALJ and the trial court found that the Commissioner believed at all times that it had a valid basis to pursue an administrative action against GRG based on its improper lending practices, which involved a variety of unlawful activities in addition to the arguably lawful one addressed by Sen. Bill No. 579. Specifically, GRG was accused, among other things, of charging and compounding excessive administrative fees and deceptively procuring duplicative collateral insurance on borrowers' loans in order to artificially boost the principal as a pretext to evade statutorily regulated interest rates, and then flat-canceling the insurance it procured without recalculating or reducing the interest rate or refunding borrower funds. Sen. Bill No. 579 was not intended to and did not address the practice of improper sale and placement of duplicative collateral insurance, which, at all times relevant, has always been unlawful.[14]

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14 In other words, as discussed above, the problem was not simply that GRG purchased collateral insurance and added it to the loan principal. It was GRG's use of

Second, the record does not support GRG's claim that it reasonably relied on the Commissioner's representations regarding the legality of its loan practices and would not have agreed to settle if it had known the Commissioner was pushing enactment of Sen. Bill No. 579. The record contains substantial evidence that GRG was represented by knowledgeable attorneys -- one of whom had previously held a high-level position on the Commissioner's staff -- at all times during the negotiations, who understood the legal landscape for a lender such as GRG, and vigorously advanced the legality of GRG's practices in communications with the Commissioner's counsel. The ALJ found GRG was quite eager to settle the entire dispute, which involved a number of issues other than those addressed by Sen. Bill No. 579. There is ample evidentiary support for that conclusion. GRG has failed to demonstrate the agreement was procured by fraud.

b. GRG has not shown the parties made a mutual mistake of law

The record is equally bereft of evidence to support GRG's contention that rescission is in order because the parties made a mutual mistake of law. This argument rests on GRG's contention the parties were mutually mistaken when they agreed GRG had three years to remit any unclaimed refunds to the Controller from the date a refund was deemed undeliverable. GRG insists that, because this was a disputed claim, under the UPL, the escheatment period must be computed from the date on which GRG determined each individual refund check was undeliverable, after conducting due

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deceptive tactics by failing to give borrowers advance notice so it could place the collateral insurance at the outset, thereby artificially increasing the interest rates and its own profit margin. As the Commissioner points out, if Sen. Bill No. 579 had been intended to address the issue about which GRG complains, the Commissioner would have taken issue with every loan GRG made that was $2,500 or more as a result of collateral insurance. It did not. The only loans with which the Commissioner took issue were those exceeding $2,500 due to GRG's force-placement of collateral insurance, which was flat-cancelled shortly after the loan documents were executed, an indication of the prohibited placement of duplicative collateral insurance and deceptive placement at the outset. The improper placement of duplicative collateral insurance for any reason, including boosting principal amounts, was unlawful before and after Sen. Bill No. 579 was passed. (See Cal. Code Regs., tit. 10 §§ 1488, subd. (c), 1490; §§ 22311, 22312.)

diligence to be sure the borrower was truly lost and unknown. (See Code Civ. Proc., §§ 1300, 1516, 1520, 1530.) GRG contends the agreement contradicts and violates the UPL by misrepresenting and bypassing the UPL's requirements regarding escheatment of the refunds in question. This argument was properly rejected.

First, the agreement reflects the appropriate time period for escheatment. The applicable provision of the UPL, Code of Civil Procedure section 1520, subdivision (a), provides for escheatment of tangible personal property "held . . . in the ordinary course of the holder's business and [which] has remained unclaimed by the owner for more than three years after it became payable." Code of Civil Procedure section 1519.5, the provision of the UPL advanced by GRG, does not apply. That statute relates to money ordered by a court or public agency to be refunded. The agreement was not imposed by the Commissioner, it is a mutually agreed upon contract. (See *Rich Vision Centers, Inc. v. Board of Medical Examiners*, *supra*, 144 Cal.App.3d at p. 117 [finding that settlement agreement by which licensee agreed to pay legal costs and expenses was not "imposed" by state agency, but was contract voluntarily agreed to by licensee, and thus one year escheat provision of Code Civ. Proc., § 1519.5 applicable to "ordered" refunds did not apply].)

"Mutual mistake of law" provides a basis for rescission of an agreement if there has been a misapprehension of law by the parties, all of whom suppose they know and understand the law and make substantially the same mistake. (Civ. Code, § 1578.) GRG has not shown the parties were mutually mistaken regarding the time permitted for it to escheat the undeliverable refunds to the Controller. The agreement refers to the correct three-year provision of the UPL. (Code Civ. Proc., § 1520, subd. (a).)

Further, the trial court found the UPL does not bear on the matter at all. Rather, the question was simply a matter of contract. The escheat provisions of the UPL act only as a "default" if no contract specifies how to dispose of the property. In this case, the parties clearly agreed what GRG would do with funds it could not return to borrowers. Thus, if the Commissioner had the authority to enter into the agreement at all -- which we have already decided it did -- the timing provision for delivery of unclaimed funds was, as the trial court found, merely a matter of the parties' clear agreement. (See *Frankel v. Board of Dental Examiners*, *supra*, 46 Cal.App.4th at pp. 543-544 [agreement to settlement administrative accusation brought by licensing agency governed by standard contract principles].) GRG's assertion that the Commissioner exceeded its authority under the UPL is a nonstarter. The parties are free to settle their dispute on any lawful, appropriate terms, including provisions the agency might otherwise lack the authority to impose. (Gov. Code, § 11415.60, subd. (c).) Thus, even if the parties had made a mistake regarding the timing for escheatment, GRG still failed to demonstrate an entitlement to rescission.

4. There is no merit in GRG's argument that it complied with applicable requirements, never placed duplicative insurance and never solicited borrowers for loans of less than $2,500

GRG's final contention is that the Commissioner never should have undertaken any disciplinary action, because GRG complied with applicable regulations, never placed duplicative insurance, and was not required to reduce its interest rates because it never solicited or made loans for less than $2,500.

The CFLL and its implementing regulations require certain disclosures to be made to borrowers "at the time the loan is made." (§ 22337, subd. (a).) One such disclosure is "insurance premiums . . . to be paid by or on behalf of the borrower." (Cal. Code Regs., tit. 10, § 1454, subd. (a)(3).) Lenders must take reasonable precautions to avoid selling insurance that will result in duplicative coverage to borrowers. (Cal. Code Regs., tit. 10 § 1488, subd. (c).) However, lenders may require borrowers to provide insurance to cover property offered as security for a loan and may also reject insurance that lacks an appropriate loss payable endorsement. (§ 22313, subd. (b); Cal. Code Regs., tit. 10, § 1499, subd. (b)(4).) GRG maintains that these provisions establish the framework within which it operates, and that there is no statutory or regulatory requirement that borrowers be provided any information *before* a loan is made.

GRG insists the collateral insurance it provided satisfied these requirements and there is no evidence it placed duplicative coverage. Indeed, GRG argues that the flat-cancellation feature (by which GRG's force-placed collateral insurance was cancelled once a borrower proved he or she had existing coverage, or provided their own insurance naming GRG as a loss payee) was specifically designed to comply with applicable law and to provide the reasonable precautions necessary to avoid selling the very collateral insurance that would result in duplicative coverage. GRG also contends that the very fact that insurance could be flat-cancelled is proof borrowers incurred no extra expenses. The record, and the statutory and regulatory scheme disprove these contentions.

First, section 22337 does not address insurance-related disclosures at all. And California Code of Regulations, title 10, section 1454, the regulation on which GRG relies, speaks only to insurance-related disclosures lenders must make when loans are made. (See § 22337, subd. (a); Cal. Code Regs., tit. 10, § 1454, subd. (a)(3).) Neither of these provisions affects the requirement that lenders take reasonable precautions to avoid duplicative insurance coverage. As discussed above, if the mandate that a lender like GRG take reasonable *precautions* to *prevent* selling insurance that *will result* in duplicate coverage has any meaning, it requires, at a minimum, some advance notification of the lender's collateral insurance requirements so that borrowers may be prepared for that eventuality *when* their loan is finalized. And, although GRG is correct that it can require adequate insurance to protect its investment and is free to reject insurance that fails to name it as a loss payable endorsee, it fails to demonstrate why these requirements could not be communicated to a borrower before a loan is made, consistent with the regulatory requirement that GRG take reasonable advance precautions to *avoid* a situation that will result in duplicate insurance coverage.

Second, GRG insists there is no evidence it ever solicited customers or that any of its borrowers ever applied for loans below the regulatory threshold, so it was never required to reduce its interest rates under section 22251, subdivision (a) in the first place. The evidentiary record directly contradicts GRG's claim that its customers never applied for loans of less than $2,500. For example, in a letter to the Commissioner written in

October 1998, GRG attempted to clarify that the *only* type of loan with which the Commissioner took issue were those "for which the original amount sought [was] less than $2,500.00 where the loan increase[d] to over $2,500.00 (an unregulated loan) as a result of lending the amount of the insurance premium . . . ." In addition, when he testified at the administrative hearing, Garry Gladstone, GRG's president, acknowledged that there were "numerous instances" when GRG had issued refunds after recasting a loan by subtracting the collateral insurance premium to result in an initial loan amount of under $2,500.

Finally, we reject GRG's assertion that there is no evidence its force-placement of collateral insurance resulted in any duplicative coverage or additional expense to any borrower. If there had been no duplicative insurance coverage, there would have been no cause for flat-cancellation of the force-placed insurance. Moreover, if borrowers had not incurred unnecessary and additional insurance-related expenses as a result of GRG's unlawful business practices, GRG would have had no reason to issue more than $300,000 in refunds after recasting just some of the loans it made between November 1995 and October 1997.

DISPOSITION

The judgment is affirmed.

<u>NOT TO BE PUBLISHED</u>

WEISBERG, J.*

We concur:

MALLANO, P.J.

ROTHSCHILD, J.

*Retired Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.